

interviews were completed and the customers had no reason to know or believe that their response was being recorded for use in an advertisement. Even if patrons were also told that they would be paid for allowing the use of their opinions in advertising, these facts need not be disclosed.

Example 6: An infomercial producer wants to include consumer endorsements for an automotive additive product featured in her commercial, but because the product has not yet been sold, there are no consumer users. The producer's staff reviews the profiles of individuals interested in working as "extras" in commercials and identifies several who are interested in automobiles. The extras are asked to use the product for several weeks and then report back to the producer. They are told that if they are selected to endorse the product in the producer's infomercial, they will receive a small payment. Viewers would not expect that these "consumer endorsers" are actors who were asked to use the product so that they could appear in the commercial or that they were compensated. Because the advertisement fails to disclose these facts, it is deceptive.

Example 7: A college student who has earned a reputation as a video game expert maintains a personal weblog or "blog" where he posts entries about his gaming experiences. Readers of his blog frequently seek his opinions about video game hardware and software. As it has done in the past, the manufacturer of a newly released video game system sends the student a free copy of the system and asks him to write about it on his blog. He tests the new gaming system and writes a favorable review. Because his review is disseminated via a form of consumer-generated media in which his relationship to the advertiser is not inherently obvious, readers are unlikely to know that he has received the video game system free of charge in exchange for his review of the product, and given the value of the video game system, this fact likely would materially affect the credibility they attach to his endorsement. Accordingly, the blogger should clearly and conspicuously disclose that he received the gaming system free of charge. The manufacturer should advise him at the time it provides the gaming system that this connection should be disclosed, and it should have procedures in place to try to monitor his postings for compliance.

Example 8: An online message board designated for discussions of new music download technology is frequented by MP3 player enthusiasts. They exchange information about new products, utilities, and the functionality of numerous playback devices. Unbeknownst to the message board community, an employee of a leading playback device manufacturer has been posting messages on the discussion board promoting the manufacturer's product. Knowledge of this post-

er's employment likely would affect the weight or credibility of her endorsement. Therefore, the poster should clearly and conspicuously disclose her relationship to the manufacturer to members and readers of the message board.

Example 9: A young man signs up to be part of a "street team" program in which points are awarded each time a team member talks to his or her friends about a particular advertiser's products. Team members can then exchange their points for prizes, such as concert tickets or electronics. These incentives would materially affect the weight or credibility of the team member's endorsements. They should be clearly and conspicuously disclosed, and the advertiser should take steps to ensure that these disclosures are being provided.

PART 259—GUIDE CONCERNING FUEL ECONOMY ADVERTISING FOR NEW AUTOMOBILES

Sec.

259.1 Definitions.

259.2 Advertising disclosures.

AUTHORITY: 15 U.S.C. 41–58.

§ 259.1 Definitions.

For the purposes of this part, the following definitions shall apply:

(a) *New automobile.* Any passenger automobile or light truck for which a fuel economy label is required under the Energy Policy and Conservation Act (42 U.S.C. 6201 et seq.) or rules promulgated thereunder, the equitable or legal title to which has never been transferred by a manufacturer, distributor, or dealer to an ultimate purchaser. The term *manufacturer* shall mean any person engaged in the manufacturing or assembling of new automobiles, including any person importing new automobiles for resale and any person who acts for and is under control of such manufacturer, assembler, or importer in connection with the distribution of new automobiles. The term *dealer* shall mean any person, resident or located in the United States or any territory thereof, engaged in the sale or distribution of new automobiles to the ultimate purchaser. The term *ultimate purchaser* means, for purposes of this part, the first person, other than a dealer purchasing in his or her capacity as a dealer, who in good faith purchases such new automobile for purposes other than resale, including a

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person who leases such vehicle for his or her personal use.

(b) *Estimated city mpg.* The gasoline consumption or mileage of new automobiles as determined in accordance with the city test procedure employed and published by the U.S. Environmental Protection Agency as described in 40 CFR 600.209-85 and expressed in miles-per-gallon, to the nearest whole mile-per-gallon, as measured, reported, published, or accepted by the U.S. Environmental Protection Agency.

(c) *Estimated highway mpg.* The gasoline consumption or mileage of new automobiles as determined in accordance with the highway test procedure employed and published by the U.S. Environmental Protection Agency as described in 40 CFR 600.209-85 and expressed in miles-per-gallon, to the nearest whole mile-per-gallon, as measured, reported, published, or accepted by the U.S. Environmental Protection Agency.

(d) *Vehicle configuration.* The unique combination of automobile features, as defined in 40 CFR 600.002-85(24).

(e) *Estimated in-use fuel economy range.* The estimated range of city and highway fuel economy of the particular new automobile on which the label is affixed, as determined in accordance with procedures employed by the U.S. Environmental Protection Agency as described in 40 CFR 600.311 (for the appropriate model year), and expressed in miles-per-gallon, to the nearest whole mile-per-gallon, as measured, reported or accepted by the U.S. Environment Protection Agency.

(f) *Range of estimated fuel economy values for the class of new automobiles.* The estimated city and highway fuel economy values of the class of automobile (e.g., compact) as determined by the U.S. Environmental Protection Agency pursuant to 40 CFR 600.315 (for the appropriate model year) and expressed in miles-per-gallon, to the nearest whole mile-per-gallon.

[60 FR 56231, Nov. 8, 1995]

§ 259.2 Advertising disclosures.

(a) No manufacturer or dealer shall make any express or implied representation in advertising concerning the

fuel economy of any new automobile¹ unless such representation is accompanied by the following clear and conspicuous disclosures:

(1) If the advertisement makes:

(i) Both a city and a highway fuel economy representation, both the “estimated city mpg” and the “estimated highway mpg” of such new automobile,² must be disclosed;

(ii) A representation regarding only city or only highway fuel economy, only the corresponding EPA estimate must be disclosed;³

(iii) A general fuel economy claim without reference to either city or highway, or if the representation refers to any combined fuel economy number, the “estimated city mpg” must be disclosed;⁴ and

(2) That the U.S. Environmental Protection Agency is the source of the “estimated city mpg” and “estimated highway mpg” and that the numbers are estimates.⁵

¹The Commission will regard as an express or implied fuel economy representation one which a reasonable consumer, upon considering the representation in the context of the entire advertisement, would understand as referring to the fuel economy performance of the vehicle or vehicles advertised.

²For purposes of § 259.2(a), the “estimated city mpg” and the “estimated highway mpg” must be those applicable to the specific nameplate being advertised. Fuel economy estimates assigned to “unique nameplates” (see 40 CFR 600.207-86(a)(2)) apply only to such unique car lines. For example, if a manufacturer has a model named the “XZA” that has fuel economy estimates assigned to it and a derivative model named the “Econo-XZA” that has separate, higher fuel economy estimates assigned to it, these higher numbers assigned to the “Econo-XZA” cannot be used in advertisements for the “XZA.”

³For example, if the representation clearly refers only to highway fuel economy, only the “estimated highway mpg” need be disclosed.

⁴Nothing in this section should be construed as prohibiting disclosure of both the city and highway estimates.

⁵The Commission will regard the following as the minimum disclosure necessary to comply with § 259.2(a)(2), regardless of the media in which the advertisement appears: “EPA estimate(s).”

Continued